IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

83-5662

No.

RECEIVED
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SUPREME COURT, U.S.

KEITH PHILLIPS, PETITIONER,

V.

COMMONWEALTH OF KENTUCKY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF KENTUCKY

J. VINCENT APRILE, II.
ASSISTANT PUBLIC ADVOCATE
STATE OFFICE BUILDING ANNEX
THIRD FLOOR
FRANKFORT, KENTUCKY 40601

J. Vincent Aprile II
COUNSEL FOR PETITIONER

October 28, 1983

OF COUNSEL:

Linda K. West
LINDA K. WEST
ASSISTANT PUBLIC ADVOCATE

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The petitioner, Keith Phillips, prays that a Writ of Certiorari be issued to review the decision herein of the Supreme Court of Kentucky.

QUESTION PRESENTED

IS THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION VIOLATED WHEN A STATE LAW PRECLUDING A CRIMINAL CONVICTION IN THE ABSENCE OF CORROBORATION OF AN ACCOMPLICE'S TESTIMONY IS REPEALED AND SAID REPEAL IS APPLIED RETROACTIVELY?

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OPINIONS BELOW

On November 13, 1981, the Kentucky Court of Appeals reversed petitioner's conviction in an unreported decision (Appendix, hereinafter App. 1-9). The Kentucky Supreme Court subsequently granted review of the Court of Appeals' decision on motion of the commonwealth. The Kentucky Supreme Court reversed the decision of the Court of Appeals and affirmed petitioner's conviction. The case was styled Keith Phillips v. Commonwealth of Kentucky, (No. 82-SC-214-D) and the decision of the Kentucky Supreme Court is reported at Phillips v. Commonwealth, Ky., 655 S.W.2d 6 (1983). (App. 37). Petitioner's timely petition for rehearing was denied August 31, 1983 (App. 37).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The Kentucky Supreme Court affirmed the petitioner's conviction on May 11, 1983. A timely petition for rehearing was thereafter filed by the petitioner. The order of the Kentucky Supreme Court denying the petitioner's petition for rehearing was entered on July 6, 1983, and this petition is timely filed within sixty (60) days thereafter. Sup.Ct.R. 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE I, SECTION 10

No State shall...pass any bill of attainder, ex post facto law...

FOURTEENTH AMENDMENT

> Section 1. All persons born or naturalized in the United States, and subjecto the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 2, 1980, petitioner was indicted in the Lyon Circuit Court for criminal syndication of theft by deception in violation of Kentucky Revised Statute (KRS) 506.120 (Transcript of Record, hereinafter TR, 1). On June 6, 1980, petitioner plead "not guilty" (TR 3).

Conviction of the charged offense required that the prosecution prove that petitioner committed the offense of theft by deception "with the purpose to establish or maintain a criminal syndicate." KRS 506.120(1). The statute defines a "criminal syndicate" as "five or more persons collaborating...on a continuing basis" in any of various criminal activities. KRS 506.120(3).

At petitioner's trial the principal witness for the prosecution was one Richard Norris. Norris testified that while he and petitioner were inmates at the State Reformatory they collaborated in a scheme whereby they fraudulently obtained credit cards, and then used the card numbers to order merchandise. Norris' testimony also linked several other individuals to the scheme. Evidence was introduced by the prosecution to corroborate Norris' testimony that petitioner had committed theft by deception. However, only Norris' testimony sought to establish the existence of a criminal syndicate, i.e. "five or more people collaborating on a continuing basis."

At the close of the evidence, petitioner requested that the jury be instructed on the necessity of corroboration of accomplice testimony in conformance with Kentucky Rule of Criminal Procedure (RCr) 9.62 (Transcript of Evidence, hereinafter TE, IV 318)(App. 38). RCr 9.62 precluded conviction for a criminal offense solely on the uncorroborated testimony of an accomplice. The rule, which was in effect at the time of the commission of the offense and when petitioner was indicted, was abolished effective September 1, 1980. Petitioner's case went to trial following the abolition of the rule. Petitioner's request for an instruction in accordance with the rule was denied. (Id.).

Petitioner was subsequently convicted of criminal syndication of theft by deception and sentenced to fifteen years imprisonment. (TE IV 352). Petitioner's sentence was within the permissible range of penalties provided for the offense of criminal syndication. KRS 506.120(2); KRS 532.020(1)(c). By contrast, had petitioner been convicted only of theft by deception the maximum sentence which he could have received was five years imprisonment. KRS 514.040(6); KRS 532.020(1)(a).

On appeal to the Kentucky Court of Appeals petitioner argued that although RCr 9.62 had been abolished at the time of his trial he was entitled to the protection of the rule inasmuch as it was in force at the time of the commission of the offense. The Kentucky Court of Appeals agreed and reversed petitioner's conviction with directions to grant a new trial. The Court relied on a previous holding of the Kentucky Supreme Court in Commonwealth v. Brown, Ky., 619 S.W.2d 699 (1981), that inasmuch as the abolition of RCr 9.62 "enables the commonwealth to convict on less evidence than previously required" the retroactive denial of its protection is constitutionally prohibited as an ex post facto law.

The commonwealth in a "motion for discretionary review," moved the Kentucky Supreme Court to review the decision of the Court of Appeals. The commonwealth's motion was granted. In its brief and in argument before the Kentucky Supreme Court the commonwealth argued that there was sufficient evidence independent of Norris' testimony to sustain petitioner's conviction. The commonwealth relied on established decisions of the Kentucky Supreme Court holding that where there is sufficient evidence to convict an accused without the testimony of an accomplice, an instruction under RCr 9.62 is not required. Smith v. Commonwealth, Ky., 599 S.W.2d 900 (1980). No challenge was made to the decision of the Court of Appeals on the grounds that petitioner could be denied the benefit of RCr 9.62 without offending the prohibition against ex post facto laws.

On May 11, 1983, the Kentucky Supreme Court issued an

opinion holding that petitioner was not entitled to the benefit of RCr 9.62. Commonwealth v. Phillips, Ky., 655 S.W.2d 6 (1983). (Justice Leibson dissenting). The Cuurt cited as dispositive its decision rendered the same day in Murphy v. Commonwealth, Ky., 652 S.W.2d 69 (1983). (App. 19-36). The Court in Murphy overruled its earlier decision in Brown, supra, and held that the refusal to apply RCr 9.62 did not constitute an ex post facto violation.[1] The Court in petitioner's case did not address those grounds presented by the commonwealth in its challenge to the decision of the Court of Appeals.

Following the decision entered by the Kentucky Supreme Court herein, petitioner filed a timely petition for rehearing on the ground that the decision of the Kentucky Supreme Court violated the constitutional prohibition against ex post facto laws. Said petition for rehearing was denied on February 26, 1982 (App. 37).

REASONS FOR GRANTING THE WRIT

BY DECIDING THAT FORMER RULE OF CRIMINAL PROCEDURE (RCr) 9.62, WHICH ALLOWED CONVICTIONS ONLY WHEN ACCOMPLICE TESTIMONY IS CORROBORATED, DOES NOT APPLY TO THE CASE AT BAR, THE KENTUCKY SUPREME COURT HAS CREATED AN EX POST FACTO LAW IN VIOLATION OF ARTICLE I, SECTION 10 AND THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The petitioner was accused of committing a crime which occurred prior to June 2, 1980. Kentucky Rule of Criminal Procedure 9.62 (RCr 9.62) was in effect at that time. The rule stated that "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense..." and

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[1] A petition for certiorari is presently pending before this Court in Murphy v. Commonwealth of Kentucky, No. 83-5352.

merely proving that a crime was committed was not sufficient corroboration. The accomplice corroboration rule was repealed on September 1, 1980.

The defendant was tried and convicted of criminal syndication in a state court in October, 1980. Defense counsel requested that a jury instruction be given which set out the law as enunciated in former RCr 9.62. The request was denied by the trial court. The jury convicted petitioner of criminal syndication and petitioner appealed the conviction to the Kentucky Court of Appeals.

In September, 1981, the Kentucky Supreme Court ruled that former RCr 9.62 was fully applicable to cases involving crimes which occurred prior to the effective date of the repeal of RCr 9.62, i.e., September 1, 1980. See Commonwealth v. Brown, Ky., 619 S.W.2d 699, 703 (1981). The court reasoned that to rule otherwise would establish an ex post facto law in violation of both the United States and Kentucky Constitutions. Id., 619 S.W.2d at 703. In petitioner's case the Kentucky Court of Appeals, citing Brown, supra, held that "to strip appellant of the protection [of RCr 9.62] would be constitutionally prohibited as a violation of the preclusion against ex post facto laws." (App. 9). On review of the Court of Appeals' decision the Kentucky Supreme Court held that petitioner was not entitled to the benefit of RCr 9.62. The Court cited its decision rendered the same day in Murphy v. Commonwealth, Ky., 652 S.W.2d 69 (1983). (App. 12). The Court in Murphy overruled Brown.

In Murphy, the court stated that the abolition of RCr 9.62 was one of procedure rather than of substance and, therefore, did not violate the constitutional prohibition against ex post facto laws. (App. 25). Justice Leibson, in a vigorous dissent, would have held that the repeal of RCr 9.62 lessened the degree of proof necessary to establish guilt and thus could not be applied retroactively except as an ex post facto law. (App. 32-36). Petitioner submits that the decision of the Kentucky Supreme Court does indeed reduce the quantum of proof required to have convicted petitioner at the time of the alleged

crime. The result is constitutionally impermissible inasmuch as it creates an ex post facto law.

As noted in Brown, "It matters not that the retroactive reduction in the quantum of proof results from the exercise of the judicial rulemaking power rather than from an enactment of a legislative body. See Bouie v. City of Columbia, 378 U.S. 347, 353, S.Ct. 1697, 1702, 12 L.Ed.2d 894 (1964)." Commonwealth v. Brown at 703. Thus, the constitutional prohibition against ex post facto laws apply to the case at bar in which a rule of criminal procedure, which was in effect at the time of the alleged crime, was abolished prior to the trial involving that crime. Indeed, judicial action amounting to creation of an ex post facto law is prohibited by the Due Process Clauses of the Fifth and Fourteenth Amendments. Marks v. United States, 430 U.S. 188, 191-192 (1977). "An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law..." Bouie v. City of Columbia, 378 U.S. at 353. Applying this principle, the Court in Bouie and Rabe v. Washington, 405 U.S. 313 (1972), reversed criminal convictions which rested on an unforeseeable judicial construction of state law. For as this Court noted in Bouie, "If a judicial construction of a statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." Bouie v. City of Columbia, 378 U.S. at 354, citing Hall, General Principles of Criminal Law (2nd Ed. 1960) at 61.[2]

In the case at bar, RCr 9.62 was in effect at the time of the alleged crime. The law at that time not only protected the petitioner from being convicted solely on the basis of accomplice testimony, but also required the prosecution to present evidence

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[2] As the Kentucky Supreme Court noted in its opinion in Murphy, Kentucky law has, since 1854, either in statutory or rule form, prohibited a conviction resting solely upon the uncorroborated testimony of an accomplice, Murphy v. Commonwealth, supra, 652 S.W.2d at 72 (App. 24). Thus, for purposes of whether retroactive application of the repeal of RCr 9.62 violates the constitutional prohibition against ex post facto, it is of no real consequence whether the law is embodied in the form of a rule or statute. This point is consistent with the observation made in Weaver v. Graham, 450 U.S. 24, 31 (1981), that "it is the effect, not the form, of the law that determines whether it is ex post facto." (Emphasis added).

which corroboarated the accomplice testimony. With the repeal of RCr 9.62 on September 1, 1980, a defendant in a criminal case could be convicted solely on the testimony of an accomplice. The quantum of proof required to convict the petitioner was substantially reduced with the repeal of RCr 9.62. Fundamental fairness and due process of law clearly require that the petitioner be afforded the safeguards embodied in RCr 9.62 which were in effect at the time of the alleged crime. As of October 18, 1979, the repeal of RCr 9.62 was certainly an unforeseeable and unexpected judicial action which amounted to a substantial change in the law. The petitioner should, therefore, not be deprived of the effect of former RCr 9.62. Moreover, the Kentucky Supreme Court's decision to overrule Commonwealth v. Brown, supra, and thereby deny the petitioner application of RCr 9.62 is equally unforeseeable especially in light of the fact that the question of overruling Brown was never presented by either party in this appeal. Considering these factors as a whole, due process of law requires that the petitioner not lose the benefit of either Commonwealth v. Brown, supra, or former RCr 9.62.

In reaching its concluson that retroactive application of the abolition of RCr 9.62 did not result in creation of an ex post facto law, the Kentucky Supreme Court in its opinion noted that the common law permitted a conviction based solely on the testimony of an accomplice. The law was, of course, modified by enactment of Section 239 of the 1854 Criminal Code and remained in effect through promulgation of RCr 9.62. Murphy v. Commonwealth, supra, 652 S.W.2d at 72 (App. 24). As to the 1980 abolition of RCr 9.62, the Kentucky Supreme Court stated, "The change is one of procedure. It does not take less evidence to convict now than before the rule was abolished." (App. 25). Relying on Hopt v. Utah, 110 U.S. 574 (1884), the Kentucky Supreme Court concluded that retroactive application of the repeal of RCr 9.62 did not violate the prohibition against ex post facto laws. Murphy v. Commonwealth, supra, 652 S.W.2d at 72-73 (App. 26). For the reasons that follow, the petitioner respectfully

submits that the effect of the Kentucky Supreme Court's action herein is to create an ex post facto law and is, therefore, unconstitutional.

In order to effectuate the purposes underlying the prohibition against ex post facto laws, this Court has held that its "decisions prescribe that two critical elements must be present for a criminal or penal law to be ex post facto, it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. at 29. See also Kring v. Missouri, 107 U.S. 221, 228-229 (1883). The case at bar meets both prongs of the aforementioned test. First, petitioner was indicted for the crime alleged herein on June 2, 1980, and RCr 9.62 was repealed on September 1, 1980. By its decision herein, repeal of the rule is made retroactive and applicable to the petitioner. Second, the petitoner is obviously disadvantaged because he can now be convicted solely on the uncorroborated testimony of an accomplice. Moreover, in Calder v. Bull, 3 U.S. 386 (1798), an ex post facto law was defined as a "law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Id., at 390. See also, Kring v. Missouri, supra, 107 U.S. at 228. In Beazell v. Ohio, 269 U.S. 167, 169-170 (1925), the definition of an ex post facto law was expanded to include any law "which deprives one charged with a crime of any defense available according to law at the time when the act was committed." Applying each of the foregoing definitions to the case at bar, there is no doubt that retroactive application of the repeal of RCr 9.62 constitutes an ex post facto law.

RCr 9.62 required corroborative evidence in addition to the testimony of an accomplice in order to obtain a conviction. With the repeal of the rule, accomplice testimony alone suffices for a conviction. This result leads to the inescapable conclusion that the rule's "abolition enables the Commonwealth to convict on less evidence than previously required." Commonwealth

v. Brown, supra, at 703. Beyond that, abolition of the rule likewise strips the accused of a defense based upon the absence of evidence other than that presented through an accomplice. Case law from other jurisdicitons supports the petitioner's position.

In Government of Virgin Islands v. Civil, 591 F.2d 255 (3rd Cir. 1979), the legislature had repealed a law identical to RCr 9.62. The Court stated because "the repeal of the corroboration statute reduces the amount of proof necessary for a conviction," Id., at 259, the retroactive application of the statute constituted an ex post facto law. Similarly, in Bowyer v. United States, D.C. App., 422 A.2d 973 (1980), the Court considered a situation where a decision ending the requirement that a prosecuting witness' testimony had to be corroborated, was applied to a crime which had taken place prior to the decision. The court reversed the conviction because the trial court refused to give the corroboration instruction. In language appropriate for the case at bar, the Court observed that its decision "altered the legal rules of evidence to require less testimony than that required at the time of the alleged rape, in order to convict. Thus, the retroactive application of that rule to an offense appellant was charged to have committed one year earlier, did precisely what the Constitution proscribes." Id., at 981. See also United States v. Williams, 475 F.2d 355 (D.C. Cir. 1973), United States v. Henson, 486 F.2d 1292 (D.C. Cir. 1973), and State v. Beyers, 627 P.2d 788, 796 (Idaho, 1981). The same conclusion is warranted in the case at bar.

One other aspect of the issue remains to be considered. As noted above, the Kentucky Supreme Court relied upon Hopt v. Utah, supra, in reaching its conclusion and ruling in essence that retroactive application of the repeal of RCr 9.62 is procedural in nature rather than substantive. Based upon this analysis, the Kentucky Supreme Court has concluded that the result herein does not violate the prohibitions against ex post facto laws. Murphy v. Commonwealth, supra, 652 S.W.2d at 72-73. The petitioner respectfully submits that the Kentucky Supreme

Court's reliance on Hopt is misplaced.

Hopt is readily distinguishable from the case at bar. Although no ex post facto violation occurs from procedural changes which do "not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt,"[3] the clear implication in Hopt is that "procedural changes which lessen the quantity or degree of proof necessary to establish guilt are in conflict with the ex post facto clause." Murphy v. Commonwealth, supra, 652 S.W.2d at 76. (Leibson, J., dissenting, App. 35). This conclusion is supported by the ruling in Hopt that "[s]tatutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage; for they do not...alter the degree, or lessen the amount of measure, of the proof which was made necessary to conviction where the crime was committed." Id., 110 U.S. at 589. Here, the Kentucky Supreme Court speaking in Murphy found no ex post facto violation by concluding that, "[t]he rule change was simply a procedure change which made a certain class of witnesses competent without corroboration." Murphy v. Commonwealth, supra, 652 S.W.2d at 73. The petitioner respectfully submits that the issue here is not one of an accomplice's competency to testify as a witness. Rather, the issue is whether the abolition of the requirement that accomplice testimony be corroborated reduces the amount of proof needed to obtain a criminal conviction. That question must obviously be answered in the affirmative. See, State v. Beyers, supra, 627 P.2d at 796.

Moreover, the essence of former RCr 9.62 does not deal with the "competency" of an accomplice to give testimony as a witness as did this Court's decision in Hopt v. Utah, supra. A competent witness is defined as "One who is legally qualified to be heard to testify in a cause." (Black's Law Dictionary,

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[3] Hopt v. Utah, supra, 110 U.S. at 590.

p. 257, 5th Ed. 1979). RCr 9.62 put no restriction on an accomplice's ability to give testimony. Instead, the rule enunciated the degree of proof necessary to obtain a criminal conviction in a case involving the use of accomplice testimony as evidence. Accordingly, it is plainly erroneous to characterize RCr 9.62 as merely a procedural rule dealing with the competency of an accomplice to give testimony in a criminal trial. Former RCr 9.62 was substantive in nature and, therefore, retroactive application of its repeal violates the constitutional prohibitions against ex post facto laws.

Former RCr 9.62 precluded conviction for a criminal offense in the absence of corroboration of an accomplice's testimony. The repeal of RCr 9.62 allows a defendant to be convicted solely on the testimony of an accomplice to the alleged crime. The repeal of RCr 9.62 clearly permits the prosecution to obtain a criminal conviction on less evidence than that which was required by the accomplice corroboration requirement. In light of the explicit prohibition against creation of ex post facto laws, the case at bar presents an important question of constitutional law. Moreover, the issue involved herein is likely to have a significant national impact because accomplice corroboration requirements are currently in effect in fifteen other states. (App. 39). In addition to Kentucky, two other states and the Virgin Islands have repealed their accomplice corroboration requirements (App. 39). The Kentucky Supreme Court, by concluding that its decision herein does not violate the constitutional prohibition against ex post facto laws, sets a significant constitutional precedent that could have substantial impact on many other jurisdictions.

The petition for a writ of certiorari should be granted in light of the important question of constitutional law presented and the national impact that a ruling on the issue will have.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Kentucky

Respectfully submitted,

J. VINCENT APRILE, II.
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

COUNSEL FOR PETITIONER

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KEITH PHILLIPS — PETITIONER

VS. NOTICE OF APPEARANCE

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * * * * * * *

The Clerk will enter my appearance as counsel for petitioner. I certify that I am a member of the bar of the United States Supreme Court. The Clerk is requested to notify the undersigned of action by the Court by regular mail.

J. Vincent Aprile II
J. VINCENT APRILE, II.
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601
(502) 564-5225

COUNSEL FOR PETITIONER

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KEITH PHILLIPS — PETITIONER

VS. MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * * * * * * *

The petitioner, Keith Phillips, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of Kentucky without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner has been permitted by the Kentucky courts to proceed as an indigent at all stages of this action. The petitioner's affidavit in support os this motion is attached hereto.

Respectfully submitted,

J. VINCENT APRILE, II.
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

COUNSEL FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

_____

No.

_____

KEITH PHILLIPS

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

_____

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

_____

I, Keith phillips, being first duly sworn, depose and say that I am the petitioner, in the above-entitled case; that in support of my motion to proceed on petition for writ of certiorari to the Supreme Court of Kentucky without being required to prepay fees, costs or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the action are true,

1. Are you presently employed? Yes____ No ✓

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

_____

_____

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 7/29 $400 a

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? - No -

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? - No -

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? - No -

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

	Name	Relationship
a.	- None -	
b.		
c.		
d.		

I understand that a false statement of answer to any questions in this affidavit will subject me to penalties for perjury.

KEVIN PHILLIPS

SUBSCRIBED AND SWORN TO before me this 24 day of October, 1983

NOTARY PUBLIC

My Commission Expires: 1-7-87

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KEITH PHILLIPS — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

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OPINION RENDERED November 13, 1981, 2 00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 81-CA-395-MR

KEITH PHILLIPS — APPELLANT

V

APPEAL FROM LYON CIRCUIT COURT
HONORABLE WILLARD B. PAXTON, JUDGE
ACTION NO. 80-CR-034-2

COMMONWEALTH OF KENTUCKY — APPELLEE

REVERSING AND REMANDING

BEFORE: WHITE, HOWARD and LESTER, Judges.

WHITE, JUDGE. This appeal is taken from the Lyon Circuit Court in which appellant Keith Phillips was convicted of criminal syndication of theft by deception.

At trial the evidence established that while Mr. Phillips was an inmate at the LaGrange Reformatory, he initiated an operation by which J. C. Penney's charge cards were fraudulently obtained and used. Subsequently, he and a co-indictee, Richard Norris, were transferred to the Eddyville State

Penitentiary, at which place he continued the scheme, was apprehended, and was indicted under KRS 506.130 for criminal syndication.

Four issues have been presented on appeal. The first, a challenge to the constitutionality of the criminal syndication statute, has not been preserved and is, therefore, not to be reviewed. A motion, complete with memorandum response from the Commonwealth, asking that the statute be struck as unconstitutionally vague was presented to the Circuit Court. Defense counsel informed the lower Court that he would "be glad for the Court to take whatever time it needs, weeks or whatever" to make the determination. The Court took the matter under advisement, proceeded with the trial, and never issued a ruling on that consideration. The record reveals no further attempt by appellant for action on that concern below.

Without a ruling upon the constitutionality motion from the Circuit Court, we are unable to consider it upon a direct appeal: there is no alleged error preserved for review. Were this Court at this time to declare the statute unconstitutional (which is not to imply that we would), the effect would be to render the judgment against appellant to be void. Thus, we would have permitted a collateral attack to have been heard upon a direct appeal. We decline to extend the standards of appellate practice in such manner.

Appellant urges that by conducting the trial and entering judgment against him, the trial court must be deemed to

have denied the motion, thus permitting our review. Although there is logic to this position, there also is logic to the established authority that an appellate court does not act de novo to consider matters upon which the lower Court has not ruled. We find the traditional perspective to be the more persuasive. "It was the duty of the appellant to insist upon a ruling on his motion, but he did not do so. He is in no position now to complain. See Davis v. Commonwealth, 279 Ky. 127, 129 S.W.2d 1030 (1939), and James v. Commonwealth, 197 Ky. 577, 247 S.W. 945 (1923)." Wilkey v. Commonwealth, Ky., 452 S.W.2d 420, 422 (1970).

Mr. Phillips' second assertion of error relates to a motion to suppress which the Circuit Court did deny. At the time in which the Penney's scheme was being operated, there were certain "incentive telephones" made available to the prisoners at Eddyville. These were not telephone devices in the accepted sense but rather were structured to allow only collect, long-distance calls to be placed by the inmates, the purpose being to allow prisoners to keep in touch by voice with those relatives and friends at too great of distance to visit regularly. Above the station was a printed sign: "This is to remind all inmates that any or all calls from these . . . (sic) TELEPHONES are SUBJECT to be MONITORED for SECURITY REASONS."

One of Mr. Phillips' calls to establish an account at Penney's was overheard by a prison's monitoring official. Subsequently, each of his calls until the time of his

arrest was monitored and taped. Tapes of the conversations relating to the Penney's operation were introduced below. Appellant moved to suppress on the grounds that such had been conducted in violation of federal and state wiretap statutes and the Fourth Amendment guarantee against unreasonable search and seizure.

A lengthy analysis of this contention is unnecessary. In considering whether searches and seizures within prison facilities are to be tested by the requirements of the Fourth Amendment, Lanza v. New York, 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384 (1962) held:

> [W]ithout attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day.

Prison authorities in the legitimate interest of internal security openly conditioned access to those phones upon an implied consent to have any or all of an inmate's calls tapped. Such monitoring therefore cannot be said to have violated a prisoner's reasonable and justifiable expectation of privacy. Katz v. U.S., 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Furthermore, consent is one of the exceptions to the federal statute precluding wiretapping. 18 U.S.C. § 2511(2)(c). The standard against which consent is met is significantly less stringent when relating to a privilege rather than a right. As noted by appellant in his

brief, use of the telephones was an incentive privilege. It was not a right; appellant cannot say that he was prejudiced by his voluntarily engaging in conversations upon telephones which he knew were subject to monitoring.

Appellant's third issue again raises the question of preservation of error. It is argued that there was insufficient evidence to have permitted conviction under criminal syndication inasmuch as the Commonwealth allegedly failed to establish the requisite minimum of five members of the syndicate. KRS 506.120(3).

At the close of testimony, appellant sought and was denied a directed verdict. Instructions were prepared to which Mr. Phillips objected on grounds of venue and failure to have included the names of all cited in the indictment. No objection was levied against the instructions upon grounds of insufficiency. An instruction on theft by deception was also given without objection. Queen v. Commonwealth, Ky., 551 S.W.2d 239, 241 (1977), held on this point:

> Queen's motion for a verdict of acquittal on the charge of first degree robbery at the close of the Commonwealth's evidence, and a renewal of that motion at the conclusion of all of the evidence was not the proper method of challenging the sufficeincy of the evidence on that issue.
>
> 'When the evidence is insufficient to sustain the burden of proof on one or more, but less than all (emphasis added) (sic), of the issues presented by the case, the correct procedure is to object to the giving of instructions on those particular issues. . .' J. Kimbrough v.

Commonwealth, Ky., 525 S.W.2d 550 (Decided April 1, 1977). At the close of all the evidence and before the trial court instructed the jury, Queen should have objected to the giving of an instruction based on armed robbery in the first degree. This he failed to do.

"The proper procedure for challenging the sufficiency of evidence on one specific count is an objection to the giving of an instruction on that charge." Seay v. Commonwealth, Ky., 609 S.W.2d 128, 130 (1981).

As noted, without objection an instruction on theft by deception was given. This instruction should not have been presented in that the indictment failed to include that charge, and it cannot be deemed a lesser included offense under criminal syndication. As with conspiracy, two distinct charges are to be made one upon the criminal syndication itself the other upon the substantive offense in which the syndicate was engaged. Cf. Arnett v. Meade, Ky., 462 S.W.2d 940 (1971)

Appellant now argues that inasmuch as the theft by deception instruction was erroneously given, the only viable count against him was that of criminal syndication. Accordingly, it is urged that a specific objection to one of several instructions on the grounds of insufficiency of evidence, as required by Queen, Kimbrough, and Seay, was inapplicable. To appellant's present thinking there was only the one charge, thereby enabling a motion for a directed verdict to have preserved the sufficiency issue.

Appellant's argument is intriguing. Having failed to

have objected below to the theft by deception instruction, it is sought that we on appeal take notice of this error and acknowledge that only the criminal syndication one was properly before the Circuit Court.

In reviewing the record from the lower Court, our role is just that: one of review. It is not one which allows the record to be structured as to permit an appellate argument to be heard which otherwise would not have been preserved.

Furthermore, even were the issue preserved, our review of the record indicates that five persons were established as having been involved with the criminal syndicate: Keith Phillips (appellant), Richard Norris, Gary Mayes, Arthur Ray Penrod, and Dave _____. Appellant concedes the involvement of Penrod and himself but argues that others were not involved on a continuing basis. We disagree.

Richard Norris' own testimony reveals his involvement:

> Q. [by appellant] Really you didn't do anything, is that right?
>
> A. Yes, sir. I was involved.
>
> . . . .
>
> I offered suggestions and moral support and discussed possible options.

Clearly this is sufficient to meet the standard of KRS 506.120(1)(a) which precludes participating "in organizing a criminal syndicate or any of its activities."

Testimony also was heard that Gary Mayes, aware that Mr. Phillips was running a credit card scam with Penney's,

insisted that merchandise be sent to him at Eddyville and that he would take full responsibility for such items. Again, KRS 506.120(1)(a) was met.

A fifth person involved in the operation was Dave. His last name was not given; however, he was identified as working at Penney's in Louisville. According to Richard Norris, Keith Phillips told him that Dave worked in the credit department and that he notified Phillips each time there was a change in the system or phone numbers in Penney's credit format.

Appellant in summation below attempted to discount this testimony as merely indicative of Mr. Phillips' being a "big talker" as if to imply that Dave either did not exist or was not actually involved in the setup. The contents of opening and closing arguments, however, are not substantive evidence. The fact therefore remains that during the evidentiary course of the trial appellant failed either through cross-examination of Mr. Norris or through the introduction of other witnesses or evidence to refute Mr. Norris' assertions regarding the role Dave played. The syndicate thereupon became established.

Appellant's final assignment of error is based upon the trial court's failure to give an instruction relating to the necessity for corroboration of an accomplice's testimony under RCr 9.62. He acknowledged that RCr 9.62 had been abolished prior to the trial but urged that inasmuch as it was in full force and effect at the time of the commission

of the crime charged that he was entitled to its protection.

Commonwealth v. Brown, Ky., 619 S.W.2d 699 (1981), is dispositive. In that case it was held that inasmuch as the abolition of RCr 9.62 "enables the Commonwealth to convict on less evidence than previosuly required," to strip appellant of its protection would be constitutionally prohibited as a violation of the preclusion against ex post facto laws.

Accordingly, on the single issue of entitlement to instruction under RCr 9.62 the judgment of the Lyon Circuit Court by which Keith Phillips received a sentence of fifteen years for criminal syndication is reversed and remanded for a new trial.

ALL CONCUR.

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Corrected Order

Commonwealth Of Kentucky

Court Of Appeals

NO. 81-CA-395-MR

KEITH PHILLIPS — APPELLANT

v.

COMMONWEALTH OF KENTUCKY — APPELLEE

APPEAL FROM LYON CIRCUIT COURT
HONORABLE WILLIARD B. PAXTON, JUDGE
CIVIL ACTION NO. 80-CR-034-2

ORDER DENYING PETITION FOR REHEARING

BEFORE: HOWARD, LESTER and WHITE, Judges.

The Court having considered the Petitions for Rehearing and being sufficiently advised, it is ORDERED that the same are hereby DENIED.

ENTERED: FEBRUARY 26, 1982

Charles B. Lester
JUDGE, COURT OF APPEALS

Rendered: May 11, 1983
To Be Published

Supreme Court of Kentucky

82-SC-214-DG
82-SC-216-DG

COMMONWEALTH OF KENTUCKY — MOVANT

V.

KEITH PHILLIPS — RESPONDENT

AND

KEITH PHILLIPS — MOVANT

V. ON REVIEW FROM COURT OF APPEALS
81-CA-395-MR
(Lyon Circuit Court #80-CR-034-2)

COMMONWEALTH OF KENTUCKY — RESPONDENT

OPINION OF THE COURT BY JUSTICE STEPHENSON

Affirming in Part; Reversing in Part

Keith Phillips was convicted of criminal syndication of theft by deception, KRS 506.120, KRS 514.040, and sentenced to fifteen years' imprisonment. The term of imprisonment was ordered to be served consecutively with the previous sentence being served by Phillips. The opinion of the Court of Appeals held that the evidence adduced at trial was sufficient to sustain a conviction for criminal syndication, but reversed the case for a new trial holding that Phillips was entitled to an accomplice instruction, RCr 9.62, and that the failure of the trial court to give this instruction constituted reversible error. Phillips moved for discretionary review asserting the evidence was insufficient to convict for the offense of criminal syndication. The Commonwealth moved for discretionary review, asserting

that an accomplice instruction was not required for the reason that there was other evidence of guilt sufficient to convict without the accomplice testimony. We granted discretionary review to Phillips and to the Commonwealth. We reverse the decision of the Court of Appeals that Phillips is entitled to a new trial for failure to give the accomplice instruction. In all other respects we affirm.

Considering first the issue of the accomplice instruction, the Court of Appeals' opinion relied upon Commonwealth v. Brown, Ky., 619 SW 2d 699 (1981). We have reconsidered and overruled Brown in Murphy v. Commonwealth, Ky., SW 2d (rendered May 11, 1983), and thus consider it unnecessary to delve in the evidence argument put forward by the Commonwealth. We are of the opinion Murphy is dispositive of this issue and reverse the decision of the Court of Appeals granting a new trial.

The criminal syndication statute is being considered by us for the first time and requires a detailing of the facts surrounding this incident. The General Assembly has provided for the offense of criminal syndication in KRS 506.120, which in part states:

> "(1) No person, with the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall do any of the following:
>
> (a) Organize or participate in organizing a criminal syndicate or any of its activities;
>
> (b) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;
>
> (c) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;

(d) Knowingly furnish legal, accounting, or other managerial services to a criminal syndicate;

(e) Commit, or conspire to attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;

. . .

(3) As used in this section 'criminal syndicate' means five (5) or more persons collaborating to promote or engage in any of the following on a continuing basis:

. . .

c. Any theft offense as defined in KRS Chapter 514; . . . ."

By its terms this statute is what is popularly known as an anti-racketeering statute, providing for a more severe penalty for engaging in organized crime. This criminal syndication statute is generally the same as enacted in several other states.

With the terms of the statute in mind, we turn now to the facts adduced at trial.

While an inmate at LaGrange, Phillips engaged in a scheme whereby he would on the telephone pose as the credit manager for a J. C. Penney store and call in a customer credit application to the company's regional office. The office would then give Phillips an account number. While at LaGrange, Phillips used this scheme to procure an account number for Norris, a fellow inmate who later testified for the Commonwealth. Norris used the account number to order merchandise for himself and later to pay a debt owed to Arthur Ray Penrod. Norris in his testimony explained Phillips had told him how he learned to pose as a credit manager from a man identified only as Dave who supplied Phillips with updated information on J. C. Penney's credit system.

Later Phillips and Norris were transferred to Eddyville where the charge account scheme was resumed. At this time a Gary Mayes was included. Phillips opened an account with Penney's for a K. D. Osborne and charged merchandise which was sent to Gray Mayes.

Phillips obtained a credit card in the name of Max Rosenberg and another in the name of Whitely, which were found in the possession of Arthur Ray Penrod. Merchandise including a color television was found in Penrod's possession. A letter from Penrod to Phillips refers to the use of the Max Rosenberg and K. D. Osborne cards.

Letters from Phillips to Norris, after Phillips' arrest, discuss the case and persons Phillips fear will expose the syndicate. Norris is asked to call Myrna Shore and cautioned to silence.

Phillips, when arrested for the offenses, identified Myrna Shore (Phillips procured a fraudulent credit card for her) as one of the persons with whom he collaborated to receive merchandise purchased on the fraudulent credit card. Shore lived in California, and in California another individual named Vette was interested in setting up the scheme on a nationwide basis. Other names were mentioned as individuals approached to participate in the scheme.

Phillips made a complete confession; his confederate Norris testified for the Commonwalth; officials at the penitentiary taped numerous phone conversations from Phillips to Penney's and to Shore in California. Letters from Phillips to Norris and Norris

to Phillips were intercepted and used in evidence. The evidence from the taped telephone calls was that other individuals were solicited to use the fraudulent credit cards.

In his argument for reversal, Phillips asserts that the evidence is insufficient to convict in that the Commonwealth failed to prove that four or more individuals named in the proof collaborated with Phillips and each other on a continuing basis and that there is no showing that Phillips acted with "the purpose to establish a syndicate."

Secondly Phillips argues that all nine of the persons named in the evidence must be shown to have collaborated on a continuing basis in order to sustain the conviction.

As to the second argument, we are of the opinion the Commonwealth is required by the express terms of the statute to prove a minimum of "five persons" collaborating. The requirement of "five persons" in the definitional portion of the statute is only a minimum number to prove a violation of the statute, and the Commonwealth is at liberty to prove or attempt to prove as many "persons collaborated" as enabled to do so by available witnesses. We are of the opinion that the "five persons" required by statute is not enlarged by virtue of the Commonwealth proving more than five persons. All the jury is required to believe for conviction is that "five or more collaborated." This is not giving a jury the option of finding alternative grounds of guilt.

Ordinarily we would not think of an organized crime group operating within a prison. However as we survey the scenario presented here, it possesses all of the trappings of the organized crime scheme the legislature intended to cover in KRS 506.120. With the evidence presented here, the jury was certainly entitled to find that Phillips organized this scheme with the purpose of establishing and maintaining a criminal syndicate. Phillips deliberately brought a number of persons, at least five, into active participation in the scheme. There was evidence he wished his friend, Shore, to be able to establish a similar scheme in California, and some evidence of an individual wishing to establish a nationwide organization. Phillips' purpose is overwhelmingly demonstrated by the evidence. The evidence also demonstrated as a jury issue that at least "five persons" collaborated in promoting or engaging in the scheme to commit theft by deception. The jury was justified under the evidence presented here in finding that at least five of the persons mentioned in the evidence collaborated in the scheme. Phillips' argument that there must be shown collaboration with "each other" as well as with Phillips enlarges the plain intent of the statute. The collaboration in the statute means simply collaborating in the scheme, and it is not necessary for the Commonwealth to show that each participant collaborating in the scheme collaborated with or even was aware of the collaboration of the other participants.

We are of the further opinion that the jury was entitled to find from the evidence here that the collaboration "to promote or engage" was on a "continuing basis." The standard of proof on this element of the crime is by its very nature indefinite. The Commonwealth is not held to proving any specific number of incidents or any element of time, but must show by the proof what the jury could infer from the evidence as intent to collaborate on a continuing basis. We are of the further opinion that the evidence presented here justified the jury in rendering a verdict based on this element of the offense.

It is this sort of organized crime that the legislature intended to denounce. The circumstance that this syndicate was organized in prison further exacerbates the nature of the crime.

We observe that Phillips and his associates have not availed themselves of the rehabilitation aspects of prison life.

The decision of the Court of Appeals granting a new trial on failure to give an accomplice instruction is reversed. In all other respects the decision of the Court of Appeals is affirmed.

Stephens, C.J., and Aker, Gant, Stephenson and Wintersheimer, JJ., concur. Leibson, J., concurs in result and dissents from so much of the opinion as overrules Brown v. Commonwealth for reasons stated in his dissent to Murphy v. Commonwealth.

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RENDERED: May 11, 1983
TO BE PUBLISHED

Supreme Court of Kentucky

81-SC-572-MR

GREGORY ARNOLD MURPHY — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. JOSEPH H. ECKERT, JUDGE
No. 79-CR-1390

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

82-SC-285-TG

GREGORY ARNOLD MURPHY — MOVANT/APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. JOSEPH H. ECKERT, JUDGE
NO. 79-CR-1390

COMMONWEALTH OF KENTUCKY — RESPONDENT/APPELLEE

OPINION OF THE COURT BY JUSTICE VANCE

AFFIRMING

Gregory Arnold Murphy appeals as a matter of right from his conviction of murder for which he was sentenced to life imprisonment. During the pendancy of the appeal, he filed

a motion for a new trial based upon the alleged discovery of new evidence. A request for a hearing upon this motion was overruled, and his appeal from that order was transferred to this court. The two appeals have been heard together, and each will be considered in this opinion.

The appellant Murphy and Norman Crittenden were indicted separately for the murder of Kim Keller who was found dead from strangulation in an alley in Louisville, Kentucky, on October 18, 1979. They were tried jointly. Murphy was convicted, and the jury was unable to agree upon a verdict as to Crittenden.

Crittenden gave a statement to the police on October 30, 1979, which was reduced to writing and signed by Crittenden in which he admitted he had seen the murder but claimed that he was a witness only, not a participant. This written statement was admitted in evidence on motion by Crittenden's counsel over objection by Murphy.

In the statement Crittenden asserted that he had been with Murphy practically the entire day on October 17, 1979, and into the morning of October 18. On the evening of October 17, Crittenden, using his automobile, drove Murphy to a number of bars, liquor stores, and night spots. At approximately 1:00 a.m., October 18, they saw the deceased at Jack's Grill, and she later joined them in the car. An argument developed between Murphy and the deceased and Crittenden, at the direction of Murphy, stopped the car, and Murphy and the deceased got out. Murphy hit the deceased in the face, and Crittenden claimed he tried to stop him

but that Murphy knocked him down, and he got back in the car. Murphy then pulled something around the deceased's neck, and after about 5 or 10 minutes Murphy got back in the car and they drove away leaving the deceased in the alley.

On September 3, 1970, Crittenden gave another statement to police officers which was tape recorded. Again he placed the responsibility for the killing on Murphy but admitted that he held the deceased's arms and legs while Murphy strangled her with a short cord. He denied that he helped pull the cord around her throat.

In the tape recording he also stated that earlier in the evening of October 17, 1979, he and Murphy had stopped to see a girl named Susan, a prostitute, and that Murphy had asked her to go with them, but she refused.

The tape recording was played before the jury over Murphy's objection.

Reinella Susan Coates testified that Murphy and Crittenden came by the hotel in which she lived and propositioned her for a date on October 17, 1979; that both were drinking heavily; that Murphy was playing with a short white cord; that they solicited her to accompany them but she refused; and that they asked her where they could find the deceased, Kim Keller. She said that less than two weeks before the 17th she had been at Murphy's house with Crittenden; that both were drinking and smoking pot; that Crittenden had said he was going to kill the deceased for ripping him off; that he was going to strangle her and beat her to death; that he asked Murphy to help him and that Murphy agreed.

Appellant sets forth ten allegations of error in his original appeal. He first contends that the tape recording and the signed statement of the codefendant Crittenden were improperly admitted in evidence because the tape and the statement incriminated him, and he had no opportunity to confront his accuser or to cross-examine him. He relies upon Bruton v. United States, 391 U.S. 12, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

It is true that the tape recording and statement were admitted during the Commonwealth's case-in-chief and before it was known whether Crittenden would testify. Thus, at the time of admission appellant had no opportunity to cross-examine his codefendant concerning the allegations that incriminated appellant.

Later in the trial, Crittenden took the stand in his own defense. His testimony at trial was a repetition of the incriminatory statements he had made against appellant in the written statement and in the tape recording. Appellant's counsel cross-examined Crittenden extensively about his incrimination of appellant.

Assuming for purposes of argument, but not deciding, that no portion of Crittenden's statement or tape recording which incriminated appellant should have been heard by the jury at the time it was heard, the fact remains that Crittenden later testified to the same matters and was cross-examined about them. It would appear that his subsequent testimony and cross-examination would render harmless any error concerning incrimination by a codefendant. See Ferguson v. Commonwealth,

Ky., 512 S.W.2d 501 (1974).

Murphy's only real claim of prejudice is that by reason of the erroneous admission of the tape recording and the Crittenden statement, he was forced to take the stand and deny the statements of his codefendant, and thus he was required to give up his constitutional right to remain silent.

The difficulty with this position is that he made no objection of this nature to the trial court. Had he made such any objection, Crittenden could have been given the opportunity to testify first. If Crittenden had been the first of the two defendants to testify, his direct testimony would have confronted appellant with the same need to testify in his own behalf. There was no requirement that Murphy be the first of the defendants to testify and Murphy, by failing to raise this issue with the trial court, precipitated the problem of which he now complains.

Appellant next contends that the trial court erred in refusing to give his tendered accomplice instruction.

This crime was committed October 18, 1979. RCr 9.62 which required corroboration of the testimony of an accomplice was abolished October 1, 1980. This trial occurred in February, 1981. In July, 1981, Commonwealth v. Brown, Ky., 619 S.W.2d 699 (1981), was decided in which this court held that RCr 9.62, would be applicable to crimes committed before its abolition but tried thereafter.

Appellant did not have the benefit of Brown at the time of his trial, nor rely upon it, yet its holding would sustain appellant's contention that he was entitled to an accomplice instruction.

We have decided to reexamine our holding in Commonwealth v. Brown, supra. Brown reasoned that a conviction could be had upon less evidence after the abolition of RCr 9.62 than before, and therefore the abolition of RCr 9.62 was ex post facto when applied to crimes committed before the rule was abolished but tried after the abolition.

At common law a conviction could be had solely on the testimony of an accomplice without corroboration. Blackburn v. Commonwealth, 12 Bush 181 (1876), Commonwealth v. Barton, 153 Ky., 465, 156 S.W. 113 (1913), Roberson, New Kentucky Criminal Law andd Procedure, 2nd Edition, Testimony of Accomplices, sections 1828 and 1829.

It was decided in the case of James Atwood and Thomas Robbins, summer assizes, at Bridgewater, County of Somerset, England (1788)[1] that the testimony of an accomplice was competent and would sustain a conviction without corroboration. It was pointed out that the problem with the testimony of an accomplice was not competency but credibility. The credibility of an accomplice is suspect because he is an admitted criminal and also because his testimony may be influenced by the hope of advantageous treatment of his case.

Kentucky followed the common law and permitted a conviction on the uncorroborated testimony of an accomplice until the adoption of section 239 of the criminal code in 1854 which prohibited a conviction solely upon uncorroborated

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[1] Reported in 2 H. Toulmin and J. Blair, A Review of the Criminal Law of the Commonwealth of Kentucky, 403-405 (1806).

testimony of an accomplice. This code provision was carried intact into subsequent criminal codes and into RCr 9.62.

The effect of the code provisions and RCr 9.62 was that testimony, otherwise competent, was deemed to be incredible as a matter of law unless corroborated in some degree. With the abolition of RCr 9.62 we have returned to the procedure as it existed at common law.

The change is one of procedure. It does not take less evidence to convict now than before the rule was abolished. The same facts must be established to prove murder or manslaughter now as before. The only change effected by the abolition of RCr 9.62 is that an impediment to the credibility of certain witnesses has been removed.

In Hopt v. Utah, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884), the Supreme Court held that a statute which removed the ineligibility of felons as witnesses was applicable in the trial of crimes committed before the passage of the statute. Thus, a conviction was upheld based upon the use of testimony which could not have been used when the crime was committed. The court held that the statute simply enlarged the class of persons competent to testify and was procedural.

> Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might in respect of that offence, be obnoxious to the constitutional inhibition upon ex post facto laws. But alterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt, but--leaving untouched the nature of the crime and the amount or degree of proof essential

> to conviction -- only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged. 110 U.S. at 590.

The elements of the offense of which appellant was convicted have not been changed. It takes the same proof to establish those elements now as it did before the abolition of RCr 9.62. Those elements were established by the testimony of the accomplice. The rule change was simply a procedure change which made a certain class of witnesses competent without corroboration. Commonwealth v. Brown, supra, is overruled, and there was no error in the failure of the trial court to give an accomplice instruction.

Appellant's contention that he was entitled to a directed verdict of not guilty is without merit. The testimony of Crittenden, standing alone, is sufficient to sustain the conviction. In addition to Crittenden, there was testimony of Reinella Coates that appellant and Crittenden were looking for the deceased a few hours before the murder; that appellant was twiddling a cord which fit the description of the murder weapon; and that a few days before the deceased was actually beaten and strangled she had heard appellant agree to help Crittenden kill the deceased by beating and strangling her.

Appellant next complains that an Assistant Commonwealth Attorney who had handled the initial phases of this case, but was not assigned to the trial, was permitted to testify

that appellant, while waiting for his attorney to appear for a pretrial conference, volunteered details of his activity the night of October 17, 1979, including the fact that he had been with Crittenden and the deceased until approximately 10:30 p.m. on that night. This was used to rebut the trial testimony of appellant that he had not seen the deceased since October 9th.

The record is not clear as to whether this testimony was heard by the jury or was put into the record as an avowal. Counsel for appellant had objected to any statement made by appellant to an Assistant Commonwealth Attorney outside the presence of his own counsel. The court held a hearing on the objection and ruled that the testimony could not be admitted. The prosecuting attorney stated the substance of the testimony the witness would give if permitted to answer. The trial judge asked the witness if he would so testify, and the witness responded affirmatively.

The prosecuting attorney then posed the question to the witness and he responded. Nothing in the record indicates that the question and the response were not a part of the hearing conducted outside the presence of the jury. It appears to be an avowal placed in the record by a question to and an answer by the witness. This conclusion is bolstered by the fact that no objection is shown to the question. The court had just ruled that the witness could not be questioned on the matter. We consider it unlikely that the defense would sit mute and allow the matter to go before the jury.

In any event, there was no error even if the testimony

was heard by the jury. It was offered to contradict the appellant's testimony in chief. Statements obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), are not admissible in chief for the prosecution, but they may be introduced in rebuttal to contradict the testimony offered by the defendant.

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment. . . .
>
> The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. . . . Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).

In Walder v. United States, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954), physical evidence, inadmissible in chief, was permitted to be used for impeachment purposes.

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.
>
> [T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility. 347 U.S. at 65.

During cross-examination of appellant by counsel for the codefendant, Crittenden, appellant was asked about and admitted a prior conviction for possession of heroin. This was admitted, not for impeachment, but ostensibly to show motive in view of the testimony that appellant killed the deceased because she had withheld from appellant his share of the proceeds from the sale of narcotics.

The vice in permitting testimony as to prior convictions is that jurors may tend to convict because of the criminal record of the accused rather than the evidence presented as to guilt. But prior convictions are admissible to show motive, guilty knowledge and intent, and we feel that the evidence of the prior conviction was not prejudicially erroneous in view of the evidence which linked narcotics as a possible motive for the murder.

Appellant contends that testimony of a pathologist concerning certain hair samples taken from the victim's clothing was prejudicial and was erroneously admitted because the pathologist testified to results of laboratory tests which were performed by others not under his supervision. In the first place, appellant's counsel on cross-examination was the first to examine the pathologist about the report. In the second place the pathologist's testimony made it plain that the results of the laboratory tests, according to the report, did not in any way link appellant to the crime. We think the testimony was not erroneously admitted and was not, in fact, adverse to appellant.

Appellant further contends the tape recording of Crittenden's statement was not admissible because the proper

foundation was not laid. Specifically, he contends that the authenticity and correctness of the recording was not established, there was no showing that alterations had not been made, and no showing of the preservation of the tape.

It is enough to point out that the officer present when the tape recording was made testified in court that he caused a transcript of the tape to be made - - that he listened to the tape before it was played in court - - that it had not been altered - - that the language on the tape played before the jury coincided with the transcription and with his memory of what was said at the time of taking. We think this sufficient to establish the correctness and preservation of the tape, and that it had not been altered.

We find no merit worthy of discussion in appellant's contention that a juror who told the trial court he could not impose the minimum penalty allowed for this crime was improperly dismissed from the panel; that testimony of Crittenden that he took a polygraph test was improper and prejudicial and that testimony of Reinella Coates expressed a conclusion on her part that the two defendants were, in her presence, conspiring to kill the deceased. The matter was put in proper perspective when Reinella Coates testified that appellant did not say he was going to strangle her, but she did hear appellant and Crittenden discussing the strangulation of the deceased "who is now dead from strangulation and beaten."

Appellant's counsel filed an unverified motion for new trial which alleged that counsel had learned that one Ralph Willock saw Kim Keller and Richard Harrison at Jack's

Crill on the night of her death, that they were arguing about money owed by Keller to Harrison from a "drug deal" and that they left together. The motion was not accompanied by any affidavit of Ralph Willock; it did not establish that due diligence was used to discover the alleged new evidence before trial, and the motion did not show in any way that a new trial would result in a different verdict.

The motion did request a hearing be set at which appellant could present evidence in support of the motion for new trial. The motion to set a hearing was overruled, but nothing in the record indicates that any order has been entered disposing of the motion for new trial. The order overruling the motion to set a hearing is an interlocutory order and is not appealable.

The Judgment of the Jefferson Circuit Court in 81-SC-572-MR is affirmed. The appeal in 82-SC-285-TG is dismissed.

Stephens, C.J., Aker, Gant, Stephenson, Vance, and Wintersheimer, JJ., concur. Leibson, J., dissents.

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Supreme Court of Kentucky

81-SC-572-MR

GREGORY ARNOLD MURPHY — APPELLANT

V. — APPEAL FROM JEFFERSON CIRCUIT COURT
Honorable Joseph H. Eckert, Judge
No. 79-CR-1390

COMMONWEALTH OF KENTUCKY — APPELLEE

and — 82-SC-285-TG

GREGORY ARNOLD MURPHY — MOVANT/APPELLANT

V. — APPEAL FROM JEFFERSON CIRCUIT COURT
Honorable Joseph H. Eckert, Judge
No. 79-CR-1390

COMMONWEALTH OF KENTUCKY — RESPONDENT/APPELLEE

DISSENTING OPINION BY JUSTICE LEIBSON

I respectfully dissent. This case contains at least two errors so prejudicial as to warrant reversal.

First, the trial court erred in refusing to give the appellant's tendered accomplice instruction. The instruction properly characterized the codefendant, Crittenden, as an accomplice as a matter of law and set forth the mandate of former RCr 9.62 that the conviction cannot be based on the uncorroborated testimony of an accomplice. To convict the jury must believe there was additional evidence tending to connect the defendant to

the crime. The majority opinion acknowledges that appellant was entitled to an instruction under Commonwealth v. Brown, Ky., 619 S.W.2d 699 (1981), but overrules that case. I believe that the reasoning in Brown is sound and disagree that it should be overruled. Further, I believe that the accomplice rule has merit. This case is a prime example of a person convicted almost entirely on the testimony of an accomplice who gave prior inconsistent statements and whose motives for testifying are highly suspect.

In Commonwealth v. Brown, supra, this court held that retroactive abolition of RCr 9.62 is ex post facto when applied to persons allegedly committing crimes while the accomplice rule was still in effect. The court noted that the rule's abrogation enables the Commonwealth to convict on less evidence than previously required and concluded that "allowing the Commonwealth to proceed with this advantage would violate Section 19 of our Constitution and Article 1, Section 10 of the Constitution of the United States, both of which forbid ex post facto laws." Id at 703.

The holding in Brown is supported by a long line of cases beginning with Calder v. Bull, 3 U.S. 386, 3 Dall. 386, 1 L.Ed. 648 (1798). Calder holds at page 390:

> "An ex post facto law, within the meaning of the U.S. Constitution, is one which ... alters the legal rules of evidence, and receives less, or different testimony, than the law required at the commission of the offense, in order to convict the offender."

The United States Supreme Court has long recognized that certain procedural changes can fall within the prohibition of the ex post facto clause. In Kring v. Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1882), the court stated at page 226:

> "(A)ny law passed after the commission of an offense which ... (i)n relation to that offense, or its consequences, alters the situation of a party to his disadvantage, ... is an ex post facto law .... No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time."

The United States Supreme Court has made it clear that judicial decisions, like legislative enactments, are ex post facto if applied retroactively to change either the quantum or kind of proof necessary to show guilt. See Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

The majority opinion cites Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), in support of its conclusion that the abolition of RCr 9.62 is a procedural change which does not alter the amount of proof necessary to convict. But a close reading of Hopt reveals that the court distinguished between laws which merely change evidentiary rules and those which change necessary proof. The court said at page 589:

> "Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto .... (T)hey do not ... alter the degree, or lessen the amount or measure of proof which was made necessary to conviction when the crime was committed." (emphasis added).

Thus, the court actually reaffirmed its earlier holding that procedural changes which lessen the quantity or degree of proof necessary to establish guilt are in conflict with the ex post facto clause.

Clearly, appellant's conviction in the present case is based on less evidence than was required by former RCr 9.62. A conviction based solely on the uncorroborated testimony of an accomplice is, by definition, a conviction based on less evidence than one based on accomplice testimony plus corroboration. The additional evidence is the independent evidence which tends to connect the accused to the commission of the crime. Additional evidence is required to prevent one from being convicted solely on his being "fingered" by another participant, because accusations by participants against each other tend to be unreliable. Taylor v. Commonwealth, Ky., 461 S.W.2d 920, (1970), cert. denied, 404 U.S. 837, 92 S.Ct. 126, 30 L.Ed.2d 70 (1971).

Because I believe that the reasons for the corroboration requirement of RCr 9.62 are as valid now as they ever were, I would not hasten the rule's demise by applying its abolition retroactively. More importantly, I believe that constitutional

principles require the prospective application approved in Commonwealth v. Brown, supra.

The second error by the trial court is its failure to strike incriminating references to the appellant in the statements of the codefendant Crittenden. These statements were improperly admitted against appellant under the United States Supreme Court decision in Bruton v. United States, 391 U.S. 12, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968). The majority concludes that this was harmless error because Crittenden later testified consistently with his previously admitted statements. Crittenden's testimony certainly was not consistent with both of his prior statements because they were in part contradictory. Moreover, the effect of admitting the statements was to force appellant to testify in violation of his constitutional right to remain silent. The order of proof at trial required appellant to go forward before his codefendant Crittenden. Appellant was placed in the untenable position of having to testify in order to rebut Crittenden's statements and present a defense in his own behalf. I do not agree with the majority opinion that appellant precipitated this error by failing to demand a change in the order of proof. This position is more innovative than realistic. It is manifestly unfair to force appellant to surrender one constitutional right in order to protect another. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

Supreme Court of Kentucky

82-SC-214-DG
(81-CA-395-MR)

COMMONWEALTH OF KENTUCKY — MOVANT

V. ON REVIEW FROM THE COURT OF APPEALS
81-CA-395-MR
(Lyon Circuit Court No. 80-CR-034-2)

KEITH PHILLIPS — RESPONDENT

ORDER DENYING PETITION FOR REHEARING

Respondent's petition for rehearing is denied.

All concur.

ENTERED August 31, 1983.

Robert F. Stephens
Chief Justice

RULE 9.62 TESTIMONY OF ACCOMPLICE

A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. In the absence of corroboration as required by law, the court shall instruct the jury to render a verdict of acquittal.

STATES REQUIRING CORROBORATION OF ACCOMPLICE TESTIMONY

Alabama	Ala. Code 1975 §12-21-222 (Bobbs Merrill, 1977)
Arkansas	Ark. Stat. Ann. §43-2116 (Bobbs Merrill, 1977)
California	Cal. Penal Code §1111 (West, 1970)
Georgia	Ga. Code Ann. §38-121 (Harrison, 1981)
Iowa	Iowa Code Ann. §813.2 Rule 20 (West, 1979)
Maryland	Rule established judicially, see Procter v. State, 435 A.2d 484 (Md. App., 1981)
Minnesota	Minn. Stat. Ann. §634-04 (West, 1983)
Montana	Mont. Rev. Code Ann. §46-16-213 (Mont., 1981)
Nevada	Nev. Rev. Stat. §175.291 (Nev., 1979)
New York	N.Y. Crim. Proc. Law §60.22 (McKinney, 1981)
Ohio	Ohio Rev. Code Ann. §2923.03 (Bobbs Merrill, 1973)
Oklahoma	Okla. Stat. Ann. tit. 22 §742 (West, 1969)
Oregon	Or. Rev. Stat. §136.440 (Or., 1981)
Tennessee	Rule established judicially, see Bethany v. State, 565 S.W.2d 900 (Tenn. Crim. App., 1978)
Texas	Tex. Crim. Pro. Code Ann. §38.14 (Vernon, 1979)

STATES HAVING REPEALED CORROBORATION RULE

Arizona	Ariz. Rev. Stat. §13-136 Repealed 1976 Ariz. Sess. Laws Ch. 116 §1
Kentucky	Kentucky Rules of Criminal Procedure (RCr 9.62); Repealed September 1, 1980
Utah	Utah Code Ann. §77-31-18 (1953); Repealed by Utah Code Ann. §77-17-7 (1983); 1980 Utah Laws Ch. 15 §2
Virgin Islands	V.I. Code Ann. titl. 14, §17 (Equity, 1964); Repealed October 25, 1978, 1978 Sess. Law No. 4229